UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MUSKIE PROPPANT, LLC,	§	
Plaintiff,	§	
vs.	§	No. 5:16–CV–580–DAE
BELLA LOGISTICS, LLC,	§	
Defendant.	§	

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Before the Court is a Motion for Summary Judgment filed by Plaintiff Muskie Proppant, LLC ("Plaintiff" or "Muskie"). (Dkt. # 12.) Defendant Bella Logistics, LLC ("Defendant" or "Bella") filed a Response to the motion (Dkt. # 18), and Plaintiff has filed a Reply (Dkt. # 19). Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing.

After careful consideration of the memoranda filed in support of and in opposition to the motion, the Court—for the reasons that follow—**GRANTS** Plaintiff's Motion for Summary Judgment (Dkt. # 12).

BACKGROUND

Plaintiff Muskie Proppant, LLC is a limited liability company based in Oklahoma City, Oklahoma. ("Compl.," Dkt. # 1 at 1.) Muskie produces "high quality custom natural sand proppants" and sells this product to customers in the North American oil and gas industry. (Id. ¶ 5.) Defendant Bella Logistics is a limited liability company with its principal place of business in Boerne, Texas. (Id. at 1.) Bella is a purchaser of Muskie's proppants and has maintained an account with Muskie since at least May 1, 2015. (Id. ¶ 6.)

Beginning in May 2015, Muskie manufactured and sold custom proppant product to Bella in response to, and in reliance on, "multiple" purchase orders. (Id. ¶ 7.) Muskie alleges full performance of its obligations under the purchase orders. (Id.) Muskie has invoiced Bella in the total amount of $1,452,842.20,[1] representing the value of the proppant manufactured and delivered between May and October 2015 to one or more locations in Texas, which Bella had specified. (Compl. ¶ 7; Dkt. # 12 at 1-2.)

---

[1] Muskie's Complaint alleges an unpaid amount of $1,452,842.20 (Compl. ¶ 7), whereas Muskie's Motion for Summary Judgment states an outstanding balance of $1,453,286.04 due and owing (Dkt. # 12 at 1). Further, Muskie's Reply states $1,454.286.04 as the debt owed. (Dkt. # 19 at 1.) The Court—for purposes of calculations—will use the "Outstanding Balance" figure that is supported by the summary judgment evidence, which is $1,453,286.04 noted in the customer account ledger. (See Dkt. # 12-41, Ex. B.)

Despite repeated demands for payment, Muskie alleges Bella has failed and refused to pay for the proppant product that was manufactured, sold, and delivered based on Bella's specifications. (Compl. ¶ 8.) Muskie sent invoices to Bella for each delivery of proppant product, which Bella ordered, on the following dates: May 27, 2015 (Invoice No. 150278); May 28, 2015 (Invoice No. 150286); June 4, 2015 (Invoice Nos. 150304, 150305, 150306); June 10, 2015 (Invoice Nos. 150311, 150312, 150313); June 11, 2015 (Invoice Nos. 150317, 150318, 150319, 150321); June 15, 2015 (Invoice Nos. 150323, 150325); June 17, 2015 (Invoice Nos. 150331, 150332); June 26, 2015 (Invoice No. 150345); June 29, 2015 (Invoice No. 150351); June 30, 2015 (Invoice Nos. 150356, 150357, 150359, 150360); July 16, 2015 (Invoice Nos. 150368, 150369); July 23, 2015 (Invoice Nos. 150377, 150378); July 31, 2015 (Invoice Nos. 150380, 150381, 150386, 150388); August 31, 2015 (Invoice Nos. 150439, 150441); September 18, 2015 (Invoice Nos. 150454, 150457); October 14, 2015 (Invoice Nos. 150470, 150471, 150472); December 18, 2015 (Invoice No. 150490); and February 26, 2016 (Invoice No. 150516). (Dkt. # 12 at 3-14; "Layton Aff.," Dkt. #12-1, Ex. A, ¶¶ 4-42; Dkts. ##12-2 to 12-40, Exs. 1-39.)

The terms of all of Muskie's invoices to Bella were identical—payment due "net 30 days," or in other words, 30 days after Bella's receipt of the invoice. (See, e.g., Dkt. # 12 at 3; Layton Aff. ¶ 4; Dkt. # 12-2, Ex. 1.) Each invoice was addressed to "Bella Logistics, 920 S. Main St., Boerne, TX, 78006" and was accompanied by a Bill of Lading, indicating that the proppant product was delivered to Bella. (Id.) To date, Muskie alleges it has not received payment for the proppant produced, delivered, and invoiced between May and October 2015, as well as for incidental shipping and rail expenses invoiced in December 2015 and February 2016. (Dkt. #12 at 14; Layton Aff. ¶¶ 43, 45.) Muskie contends that the only reason Bella has given for lack of payment owed is that Bella's largest customer failed to pay Bella, and thus in turn, Bella could not pay Muskie. (Dkt. # 12 at 17; Layton Aff. ¶ 44.)

On June 21, 2016, Muskie initiated the present case by filing its Complaint alleging three causes of action against Bella: (1) account stated, (2) breach of contract, and (3) unjust enrichment. (Compl. at 2-4.) Muskie seeks actual damages in the amount of *at least* $1,452,842.20[2], pre- and post-judgment interest, and reasonable attorneys' fees and costs. (Id. at 4; see also Dkt. # 12 at 18.) Bella filed its Answer on July 19, 2016 (Dkt. # 6) and an Amended Answer on November 16, 2016 ("Am. Ans.," Dkt. # 21).

Bella asserts the affirmative defense of set-off, claiming that Bella is owed $75,004.50 for unpaid services rendered to Muskie. (Am. Ans. at 2.) Specifically, Bella contends that Muskie and Bella agreed that Bella would provide

[2] This is the original debt figure alleged in the Complaint.

"trans-loading and storage services" in partial payment of the amount due for the product ordered from Muskie between May and October 2015. (Dkt. # 18 at 1.) Bella seeks "credit" for the $75,004.50 in trans-loading and storage that it has provided to Muskie to date. ("Holbert Aff.," Dkt. #18-1, Ex. A.) Muskie concedes that the debt it seeks to collect from Bella should be subject to a set-off in the amount of $75,004.50, but that Bella is still liable to Muskie for an amount totaling $1,379,281.54.[3] (Dkt. # 19 at 2.)

On September 28, 2016, Muskie filed the instant Motion for Summary Judgment. (Dkt. # 12.) On November 2, 2016, Bella filed a Response. (Dkt. # 18.) Muskie filed its Reply on November 9, 2016. (Dkt. # 19.)

LEGAL STANDARD

I. Motion for Summary Judgment under Rule 56

A movant should be granted summary judgment upon a showing that "there is no genuine dispute as to any material fact," and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is

[3] This is the figure alleged in the Reply and assumes $1,454.286.04 as the net amount due to Muskie. (See Dkt. # 19 at 1.)

material if it "might affect the outcome of the suit under the governing law[;] [f]actual disputes that are irrelevant or unnecessary will not be counted." Id.

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Par. Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "'Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

DISCUSSION

Muskie has moved for summary judgment against Bella on two of the three claims alleged in its complaint: (1) account stated, and (2) breach of contract. (Dkt. # 12 at 1.) Because the Court has jurisdiction over the case pursuant to diversity of citizenship of the parties satisfying the amount in controversy requirement (28 U.S.C. § 1332), the applicable law governing Muskie's claims is Texas state law. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941) (a federal court sitting in diversity applies the choice of law rules of the state in which it sits); Jackson v. W. Telemarketing Corp. Outbound, 245 F.3d 518, 523 (5th Cir. 2001) ("Texas adheres to the most significant relationship test for both contract and tort cases . . . [and though] the number of contacts is relevant, the qualitative nature of the contacts controls") (internal citation omitted). Where "virtually all of the relevant conduct" between Muskie and Bella occurred in Texas, Texas law controls Muskie's claims against Bella. See Jackson, 245 F.3d at 523. Each of Muskie's claims is addressed here in turn.

I. Account Stated Claim

The prima facie case for an account stated claim in Texas requires the plaintiff to show: (1) an agreement, express or implied, (2) between two persons who have had previous transactions, (3) fixing an amount due with respect to such transactions, and (4) promising payment by the one to be charged, either expressly

or impliedly. Nguyen v. Citibank, N.A., 403 S.W.3d 927, 930 n.3 (Tex. App. 2013) (internal citation omitted); Compton v. Citibank (S.D.), N.A., 364 S.W.3d 415, 417-18 (Tex. App. 2012).

The record contains no disputed facts as to any of these elements. It is clear from the thirty-nine invoices, which Muskie attached to its summary judgment motion, that Muskie and Bella had several express agreements regarding the purchase and delivery of proppant product beginning on May 27, 2015. (Dkt. # 12 at 3-14, 16; Layton Aff. ¶¶ 4-42; Dkts. ## 12-2 to 12-40, Exs. 1-39.) Each invoice clearly identifies the date, a "Purchase Order Number," "Bella Logistics" as the customer, the amount of proppant product "Ordered" and "Shipped," and the total price for that specific order. (See, e.g., Dkt. # 12-2, Ex. 1.)

Bella does not dispute or provide any contrary evidence that these invoices are somehow deficient, inaccurate, were never received, have been altered, or do not reflect the purchase agreements between the two parties. Neither does Bella dispute or provide any evidence that it ever objected to the delivery, quality, or quantity of proppant received from Muskie, which may have affected its decision to pay in full. Finally, Bella does not contest that it promised to pay for the proppant from Muskie or that it ever challenged the amount that Muskie charged for the proppant.

Rather, Bella very simply acknowledges that, "[b]etween May 2015 and October 2015, Bella purchased certain product from Plaintiff, Muskie Proppant LLC," and thus, "an amount due to [sic] was generated to Muskie from Bella." (Dkt. # 18 at 1.) Bella's only assertion, through its thread-bare response to Muskie's summary judgment motion, as well as through the Affidavit of Bella's Director of Supply and Logistics, is that Bella and Muskie had agreed that "Bella would provide trans-loading and storage services for Muskie" in partial payment of the amount due. (Id.; Holbert Aff. at 1.) Thus, Bella contends it is owed $75,004.50 for these services as a set-off to the total amount it owes Muskie. (Dkt. # 18 at 1; Holbert Aff. at 2.) But because Muskie expressly concedes that this set-off amount is accurate and should be deducted from Bella's total debt owed (Dkt. # 19 at 2), there is "no genuine dispute as to any material fact" of Muskie's account stated claim against Bella. See Fed. R. Civ. P. 56(a).

Since Muskie has produced summary judgment evidence that has not been refuted, contradicted, or disputed in any way by Bella's response, excepting the set-off amount that has been conceded, Bella—as the nonmoving party—"has not come forward with specific facts that establish the existence of a genuine issue for trial." See Transmaritime, Inc., 738 F.3d at 706. Although Bella argues summary judgment is improper because its debt should be reduced by the set-off amount, which creates "a fact issue as to the balance owed" (Dkt. # 18 at 2), it has not produced evidence, disputed, or challenged either (1) the total dollar figure of all of its purchases of proppant or (2) that the balance is indeed owed to Muskie in the first place. "Factual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists." Lynch Props., Inc. v. Potomac Ins. Co., 140 F.3d 622, 625 (5th Cir. 1998) (internal citation omitted); see also Celotex Corp., 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]").

Thus, taking the record as a whole and the summary judgment evidence presented, a rational fact-finder could not find that Bella does not owe Muskie *at least* $1,378,281.54—an amount that not only reflects the conceded $75,004.50 set-off for Bella's trans-loading and storage services, but also reflects the undisputed amount of proppant delivered and invoiced to Bella: $1,453,286.04. See Hillman, 697 F.3d at 302 (internal quotations omitted); Dkt. # 12-41, Ex. B.

Accordingly, the Court **GRANTS** summary judgment as to Muskie's account stated claim against Bella.

II. Breach of Contract Claim

The prima facie case for a breach of contract claim in Texas requires a showing that: (1) a valid contract existed, (2) the plaintiff performed or tendered performance, (3) the defendant breached the contract, and (4) the plaintiff was damaged as a result of defendant's breach. Levetz v. Sutton, 404 S.W.3d 798, 803 (Tex. App. 2013) (internal citation omitted); Oliphant Fin., L.L.C. v. Galaviz, 299 S.W.3d 829, 834 (Tex. App. 2009). "A breach of contract claim accrues when the contract is breached," Stine v. Stewart, 80 S.W.3d 586, 592 (Tex. 2002), and a breach occurs "when a party fails to perform an act that it has contractually promised to perform." Greene v. Farmers Ins. Exch., 446 S.W.3d 761, 765 (Tex. 2014). Whether there has been a breach by a party to a contract is a matter of law that a court may decide on summary judgment. Hovorka v. Cmty. Health Sys., Inc., 262 S.W.3d 503, 509 (Tex. App. 2008).

Here, again, the Court finds that the record contains no genuine disputes as to any material fact supporting Muskie's breach of contract claim against Bella. See Meadaa, 756 F.3d at 880. Attached to its summary judgment motion, Muskie included copies of thirty-nine invoices sent to Bella, including the corresponding Bills of Lading, confirming the proppant product was delivered to Bella for each invoice. (Dkt. # 12 at 3-14, 16; Layton Aff. ¶¶ 4-42; Dkts. ##12-2 to 12-40, Exs. 1-39.) Bella does not dispute that these invoices constitute valid and binding contracts of indebtedness for the proppant product delivered by Muskie. Bella also does not dispute that it received from Muskie the shipments of proppant that are invoiced and does not challenge the respective rail and shipping charges.

Bella does not allege or provide any evidence that it does not owe Muskie for the proppant Bella ordered from May through October 2015.

Simply put, Muskie's summary judgment evidence has not been disputed or controverted by Bella. The invoices (Dkts. ## 12-2 to 12-40, Exs. 1-39), the Bella customer account ledger (Dkt. #12-41, Ex. B), and the affidavit by Muskie's Chief Financial Officer (Layton Aff.) all demonstrate that Muskie is owed a total principal amount of $1,453,286.04 as of the date of the ledger: May 10, 2016. Muskie's Reply concedes that Bella is owed a $75,004.50 set-off. (Dkt. # 19 at 2.) Thus, by the Court's calculation, Muskie has conclusively established its right to recover $1,378,281.54 as principal on the unpaid invoices, and Bella has not responded with any evidence to the contrary.

Accordingly, the Court **GRANTS** summary judgment as to Muskie's breach of contract claim, as well.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Dkt. # 12) on the account stated and breach of contract claims. The Court **ORDERS** Defendant to pay Plaintiff: (1) a principal amount of $1,378,281.54 for the debt owed, (2) pre- and post-judgment interest on the principal, and (3) Plaintiff's reasonable attorneys' fees, in an amount to be determined upon separate application.

It is **FURTHER ORDERED** that this case be **DISMISSED WITH PREJUDICE.** The hearing scheduled for January 27, 2017 is **CANCELLED.**

IT IS SO ORDERED.

DATE: San Antonio, Texas, December 6th, 2016.

DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE